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Supreme Court, U.S.
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No. 03-1398

IN THE

Supreme Court of the United States

Eugene Crum, Jr., et al.

Petitioners,

v.

Thomas G. Flowers, et al.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Respondents acknowledge that *Devlin* v. *Scardelletti*, 536 U.S. 1 (2002), like numerous prior precedents, "recognize[d] an appeal right in nonparties *who actually are bound by a judgment of the district court*." BIO 15 (emphasis in original). That principle is dispositive here. Petitioners are indisputably bound by the district court judgment from which they appealed, because it disposed of petitioners' own motion. As the petition made clear, petitioners have the unassailable right to appeal that judgment, and the Eleventh Circuit's holding to the contrary conflicts with an uninterrupted line of this Court's precedent and merits summary reversal. Respondents' efforts to defend the court of appeals' indefensible holding are unconvincing.

1. Respondents contend that *Marino* v. *Ortiz*, 484 U.S. 301 (1988), stands for the proposition that persons who are neither original parties to, nor intervenors in, an underlying lawsuit may never appeal any judgment in that lawsuit. But in *Devlin*, this Court firmly rejected that contention:

> We have never * * * restricted the right to appeal to named parties to the litigation. * * * In [*Marino*], we refused to allow an appeal of a settlement by a group of white police officers who were not members of the class of minority officers that had brought a racial discrimination claim against the New York Police Department. Although the settlement affected them, the District Court's decision *did not finally dispose of any right or claim they might have had* because they were not members of the class.

536 U.S. at 7, 9 (emphasis added).

Here, unlike in *Marino*, the district court's dismissal of the appellants' motion finally disposed of the appellants' claim: namely, petitioners' right to enforce the *Frazer* injunction pursuant to Federal Rule of Civil Procedure 71. Petitioners, of course, appeal *only* that final disposition.

Petitioners' right to appeal arises not merely from the fact that they are affected by the district court's judgment, but from the fact that they are *bound* by it. Nor is petitioners' right to appeal based on their status as "putative class members in an altogether separate discrimination case" (BIO 11); rather, it is based on their status as the persons who filed the motion that the district court denied. If petitioners cannot appeal that denial, nobody can, and respondents have presented no justification for creating a category of final district court orders immunized from any appellate review. Indeed, because persons who file Rule 71 motions are by definition nonparties in the underlying litigation, the Eleventh Circuit's holding would make the denial of Rule 71 motions *always unappealable*. There is no support for stripping proceedings on an important Rule of Civil Procedure from the jurisdiction of the courts of appeals.[1]

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[1] Respondents cite *Marino* for the proposition that petitioners should be required to intervene for the purposes of appeal. But that argument, too, was squarely rejected by the Court in *Devlin*, and it is also inconsistent with a long line of this Court's cases, discussed below, permitting nonparties—without intervention—to appeal collateral orders that bind them. An intervention requirement would make the right to appeal even judgments that bind the would-be appellant contingent on the district court's discretion, allowing district courts to insulate their own holdings from review. Such a right is no right at all. And an intervention requirement makes even less sense in the context of Rule 71 motions, since bringing a Rule 71 motion is a form of quasi-intervention and has been treated as a form of intervention by the lower courts; like Rule 24 intervention, it is a way for a nonparty to assert the right to participate formally in the case. See, *e.g.*, *Berger* v. *Heckler*, 771 F.2d 1556, 1565 n.13, 1566 (CA2 1985) (referring to "Rule 71 intervenors" and the right to "intervene under Rule 71"). To require unsuccessful Rule 71 intervenors to subsequently move to intervene for the purposes of appeal would be redundant and wasteful, and should not be required, just as would-be intervenors

2. Respondents' efforts to distinguish *Devlin* are unavailing. First, the central proposition for which *Devlin* stands, as respondents themselves acknowledge (BIO 15), is that persons bound by a final district court judgment may appeal. This proposition is not limited to the mandatory class action context. Indeed, to support it, *Devlin* relied on three of this Court's previous cases, none of which involved class action procedures. See *United States Catholic Conference* v. *Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76 (1988); *Hinckley* v. *Gilman, C., & S.R. Co.*, 94 U.S. 467 (1877); *Blossom* v. *Milwaukee & Chicago R. Co.*, 68 U.S. (1 Wall.) 655 (1864).

Consistent with Devlin, every other court of appeals rejects respondents' view of appellate standing. No other circuit has taken the position adopted by the Eleventh Circuit in this case—that nonparties to the underlying litigation are, merely by virtue of their status as nonparties, barred from appealing orders that finally dispose of their own claims. See, *e.g.*, *Pediatric Specialty Care, Inc.* v. *Ark. Dep't of Human Servs.*, 364 F.3d 925 (CA8 2004) (holding that nonparties may appeal orders that purport to bind them); *Karaha Bodas Co.* v. *PERTAMINA*, 313 F.3d 70, 81-82 (CA2 2002); *Dellwood Farms, Inc.* v. *Cargill, Inc.*, 128 F.3d 1122, 1125 (CA7 1997) (holding that nonparties, unlike parties, may appeal discovery orders because they have "no appellate remedy at the end of the litigation"); *Maiz* v. *Virani*, 311 F.3d 334 (CA5 2002) (nonparties may appeal a district court order that has effect of divesting them of property because they "allege an actual injury" that gives them a "sufficient personal stake"). Indeed, many courts of appeals apply an equitable standard that permits nonparties to appeal even orders *not* issued in response to their own motions or otherwise directly

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are not required to attempt to intervene a second time for the purposes of appealing the denial of their Rule 24 motions.

purporting to bind them. See, *e.g.*, *Binker* v. *Pennsylvania*, 977 F.2d 738 (CA3 1992); *EEOC* v. *Pan American World Airways*, 897 F.2d 1499 (CA9 1990).[2]

Second, any distinctions between this case and *Devlin* make this case by far the *easier* of the two; indeed, it proceeds *a fortiori* from *Devlin*. The reason the Court referred in *Devlin* to the nature of the mandatory class action procedure, under which a non-named class member is bound by a settlement, is because in *Devlin* the *only* asserted basis for the petitioner's standing to appeal—the only reason the petitioner was bound by the settlement he appealed—was his status as a member of the class. Here, in contrast, petitioners, although not named parties to the underlying *Frazer* litigation itself, appealed from a collateral order in that litigation that bound them directly and on its face by denying their own motion. Petitioners' standing to appeal (as opposed to the merits issue—their right to enforce the *Frazer* injunction) does not in the least depend on whether they are members of a "class" of intended beneficiaries of *Frazer*. As parties to the collateral order being appealed, petitioners clearly have standing not just under *Devlin*, but even under the more

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[2] The Eleventh Circuit's decision in *AAL High Yield Bond Fund* v. *Deloitte & Touche LLP*, 361 F.3d 1305 (2004), is not on point. In *AAL*, the court emphasized that the appellants, having been excluded from the class, were not bound in any way by the settlement they sought to challenge (*id.* at 1309-10); here, petitioners are bound. An objector's appeal from the denial of objections to a class action settlement is a challenge to the settlement itself, not to a collateral order, and so the relevant question is whether the settlement binds the objector. In any event, even if *AAL* could be read to support the proposition that nonparties to underlying litigation other than class members may never appeal, that fact would in any event argue more strongly in favor of a grant of certiorari (and summary reversal), since it simply would demonstrate the Eleventh Circuit's repeated refusal to obey this Court's precedent, and would deepen the split among the courts of appeals as to the scope of *Devlin*'s holding.

restrictive view of appellate standing embraced by the *Devlin* dissent. See Pet. 8-9.

3. This case is thus controlled by this Court's holdings in *United States Catholic Conference*, *Hinckley*, and *Blossom*, all of which established that a nonparty to underlying litigation has the right to appeal from the denial of his own collateral motion. As with *Devlin*, respondents attempt to limit these decisions to their bare facts, contending that none of them "involved an appellant who was for all intents and purposes a legal stranger to the underlying litigation." But petitioners here are no more "legal strangers" to the underlying litigation than were the appellants in those three cases. It is untenable to suggest that a bidder for property at a foreclosure sale, like the appellant in *Blossom*, is more deeply involved with the underlying litigation than petitioners here are; that foreclosure litigation had nothing whatsoever to do with the bidder, but simply had the effect of providing that bidder (and everyone else in the world) an opportunity to buy the property. The bidder's right to appeal was grounded not on his legal status in the *underlying litigation*, but on the fact that he brought a motion to compel the sale and that motion was denied. Like petitioners here, he appealed only the order that bound him by denying his motion.

Similarly, in *Hinckley* and *United States Catholic Conference*, the appellants were "legal strangers" to the underlying litigation in the same, immaterial sense that respondents contend is true here: those appellants were not named parties and were bound only by those specific orders that directly purported to bind them. Indeed, that principle of appellate standing has been firmly grounded in this Court's precedents for well over a century. See, *e.g.*, *Williams* v. *Morgan*, 111 U.S. 684, 698-99 (1884) (citing five previous such cases in various contexts, and following *Blossom* to uphold the appellate standing of foreclosure sale purchasers).

Respondents convolute matters by emphasizing that petitioners are not bound *by the* Frazer *injunction itself*, which

is true but irrelevant. See BIO 15. Petitioners are not appealing from the *Frazer* injunction, so it does not matter whether they are bound by it. What matters is whether they are bound by the order from which they are appealing. And they are clearly so bound, notwithstanding respondents' bizarre contention that because petitioners are "not class members in any underlying class action, they are not 'bound' in any relevant sense—i.e., in the *Devlin* sense—by anything a court may say or do in the *Frazer* litigation." Many things courts say or do bind nonparties in a relevant sense, notably including the issuance of contempt orders against witnesses (*United States Catholic Conference*), orders to receivers to make payments (*Hinckley*), and orders denying collateral motions brought by those nonparties (*e.g.*, *Blossom*, *Williams*, and this case). Petitioners are, as a result of the denial of their motion, precluded from seeking to enforce the *Frazer* motion pursuant to Rule 71.[3]

4. Petitioners' argument—the exact same argument this Court has repeatedly endorsed—thus hardly threatens to "throw wide open the gates to random, oddball—and worse, malicious—filings." BIO 17. The right to appeal a district court's final disposition of one's own motion has *always* been recognized, and respondents' "Pandora's box" has proved to be empty. *Id.* Random, oddball, and malicious filings can be thrown rapidly out of court on any number of grounds (and lawyers sanctioned for filing them), and courts of appeals can

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[3] Respondents' assertion that petitioners retain an equivalent right to appeal the district court's Rule 71 holding through a later appeal in the *Crum* litigation is inaccurate. The most that respondents can offer is the prospect that years down the road when the *Crum* litigation is completed petitioners could bring such an appeal. But that appeal would be meaningless; the Rule 71 right would be empty if enforcement could only be sought *after* relitigating the claims underlying the initial injunction. As explained in the petition, Rule 71 exists precisely to avoid such relitigation.

quickly affirm those dismissals; they do not need an artificial limit on appellate standing that allows serious errors in the district court to go completely unredressed to prevent the parade of horrors respondents conjure.

Moreover, this Court would not have to endorse the "absolute rule" respondents wrongly ascribe to petitioners—"that any person, no matter how distant his relation to the underlying litigation, has an absolute right to appeal the disposition of any motion he may file"—in order to conclude that summary reversal is appropriate here. Indeed, it is the court of appeals' stance that is indefensibly absolute: that the petitioners, for the *sole and sufficient* reason that they are not named parties, lack standing to appeal. Petitioners, by contrast, acknowledge that there are numerous appropriate limits on the right to appeal; but this case does not present any. Petitioners are not "alien" to the case, and their motion is not "bizarre." *Id.* They are the very class of people whose rights under the Constitution and the civil rights laws are at stake in the *Frazer* litigation, and as intended beneficiaries of the *Frazer* injunction they have a right to enforce it under Rule 71; at the very least, their construction of Rule 71 (which has been accepted by several circuits) is not even remotely frivolous. There is therefore no judicial efficiency justification for the unprecedented limit on appellate standing that the court of appeals adopted here.

5. Finally, this Court's intervention is warranted because, as the petition demonstrated, this case is of extraordinary importance for the civil rights of the African-American citizens of Alabama. This is no mere two-party litigation. Rather, it concerns the rights of over 100,000 state employees and job applicants. And it does not simply concern the "last vestige[s]" of past discrimination (BIO 4), but rather ongoing and systematic violations of civil rights, including many of the same practices that the district court has previously found unlawful in the *Frazer* litigation. This is why, notwithstanding the respondents' suggestions to the contrary, the *entirety* of the *Frazer* injunction remains in

place. Respondents point only to a single provision of the injunction (the "no-bypass rule") that they have moved the district court to terminate (BIO 3); but litigation over that issue is ongoing, and that rule amounts to only a tiny fraction of the injunction's provisions. Respondents implicitly challenge the continued appropriateness of the injunction, contending the state's practices have changed sufficiently to make it unnecessary. That contention is wholly inconsistent with the facts, but it is also irrelevant; whether the injunction should continue is not presented by this case. The injunction remains in force today, and the respondents have already repeatedly violated it and are continuing to do so, as petitioners have alleged and will prove when they are permitted to bring their contempt motion.[4]

Serious racial discrimination in public employment is an unfortunate reality, and the ability of petitioners to enforce the *Frazer* injunction by seeking civil contempt sanctions is an important weapon against that discrimination. The Federal Rules of Civil Procedure provide third-party beneficiaries of injunctions with an enforcement right in order to prevent them from having to relitigate liability and remedial issues already decided by the federal courts. The court of appeals' decision in this case will result in precisely such wasteful relitigation, remove the teeth from the *Frazer* injunction, and

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[4] Petitioners' contempt motion alleges that numerous different current state employment practices violate the injunctions, such as, for example, the use of "closed registers" that have the effect of freezing African Americans out of employment opportunities, and a failure to require that certified African Americans who are eligible be interviewed. Contempt Mot., No. 94-T-356-N at 10, 12 (April 5, 2001). And, indeed, the motion alleges that the state has simply circumvented the "no-bypass" rule; that rule requires the state to hire African Americans unless there are "higher-ranking white applicants," but the state has "complied" with it, if at all, by manipulating the ranking process to ensure that white applicants rank higher. *Id.* at 7.

severely set back Alabama's progress toward dismantling the system of occupational segregation that today continues to hobble the prospects of its African-American citizens.

CONCLUSION

For the foregoing reasons, and those presented in the petition, this Court should grant certiorari and summarily reverse the judgment of the court of appeals.

Respectfully submitted,

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